United States Court of Appeals

for the Second Circuit

APPENDIX

74-1664

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1664

RAYMOND ARGRO,

Appellee,

v.

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States
District Court for the Eastern District
of New York

(John F. Dooling, Jr., Judge)

APPENDIX

DAVID E. TRAGER
United States Attorney

KENNETH KAPLAN
Assistant United States Attorney

S. CASS WEILAND
Attorney, Department of Justice
Washington, D.C.

Attorneys for Appellants

PAGINATION AS IN ORIGINAL COPY

APPENDIX ENTRIES

74 C 148

DOCKET

TITLE OF CASE	ATTORNEYS
UNITED STATES OF AMERICA	*For Plaintiff:* EDWARD JOHN BOYD V U. S. ATTORNEY
VS.	
RAYMOND ARGRO	*For Defendant:* FEDERAL DEFENDER SERVICES UNIT- LEGAL AID SOCIETY -26 Court St., Bklyn., N.Y. Room 701 EDWARD J. KELLY, ESQ. (Of Counsel)
BASIS OF ACTION: (Related Case 96-CR-314)	
JURY TRIAL CLAIMED ON	

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
1-28-74	FORMA PAUPERIS	-	-				

ABSTRACT OF COSTS		RECEIPTS, REMARKS, ETC.
TO WHOM DUE	AMOUNT	

F27

. 74-C-143 U.S.A. vs. RAYMOND ARGRO

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
1-28-74	Copy of MOTION FILED together with MEMORANDUM and ORDER dated December 17, 1973 (annexed thereto)	1
1-28-74	Copy of MEMORANDUM OF LAW FILED (11 pages)	2
1-28-74	Copy of MEMORANDUM OF LAW FILED (17 pages)	3
1-28-74	Copy of Petition of JAMES A. PASCARELLA, Assistant U.S.Atty.,etc.	4
1-28-74	Copy of Order filed that Warden retain Raymond Argro at Federal Headquerters, 427 West St.,N.Y.C., until Jan. 15,1974, etc.	5
1-28-74	Before DOOLING, J. Case called. Bail application, Habeas Corpus, etc. MOTION ARGUED. DECISION RESERVED.	
1-74	BY DOOLING, J. MEMORANDUM and ORDER FILED. ORDERED that the stay of the parolee's removal to Lewisburg is continued pending determination of the question whether the parolee should be admitted to bail, and if so on what bail terms. Counsel should agree on a prompt hearing date on the bail issue. (See Memo.,etc.)	6
2-6-74	Memorandum of Law filed (U.S.Atty.)	7
2-6-74	Memorandum of Law filed (LEGAL AID)	8
2-12-74	Before DOOLING, J. Case called. Raymond Argro , etc.. present. Petitioner's motion for bail argued and DENIED without prejudice, etc.	
2-22-74	Letter of relator herein filed addressed to DOOLING, J. , etc.	9
2-26-74	Notice of motion for an order reaching and deciding the issues raised by petitioner, etc. filed(judge to set date).	10
2-1-74	BY DOOLING, J. ORDER FILED. ORDERED that the petitioner-defendant be released from custody upon his execution of a personal appearance bond in the amount of $25,000 without deposit of cash or other security until such time as, after due hearing, the Board of Parole revokes the order of parole and terminates the parole of petitioner-defendant, such personal appearance bond to be conditioned that petitioner-defendant appear for any local parole hearing, etc. (See order) Copy sent out by the secretary to DOOLING, J., etc.	11
3-11-74	Minutes of stenographer filed dated Jan. 28, 1974	12
3-22-74	NOTICE OF APPEAL FILED. (U.S.A.)	13
3-22-74	Instructions re preparation of record, etc., were on this day handed to a representative of the U.S. Attorney's office,etc.	
3-22-74	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : MOTION

RAYMOND ARGRO, : 66 CR 314

Defendant. :

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SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD J. KELLY, duly sworn to this 9th day of January 1974, and upon all the papers and proceedings heretofore and herein, the undersigned, in behalf of the defendant, RAYMOND ARGRO, will move this Court before the Honorable JOHN F. DOOLING, JR., in the United States District Court of the Eastern District of New York, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York, at a time and place to be fixed by the Court, but no later than January 15 1974, the date now set for the expiration of the stay of the defendant's removal from Federal Detention Headquarters, for an order (1) granting a further stay of the defendant's removal pending the final determination of this motion and parole revocation proceedings (2) directing that said parole revocation proceedings be held at Federal Detention Headquarters, 427 West Street, New York, New York 10014 and (3) granting the release of the defendant on appropriate bail pending final determination of the parole revocation proceedings; and for such other and further relief as to the Court may seem just and proper.

DATED: BROOKLYN, NEW YORK

January 9, 1974

Yours, etc.,

ROBERT KASANOF, ESQ.,
Federal Defender Services
Unit/The Legal Aid Society
26 Court Street, Room 701
Brooklyn, New York 11201

TO: EDWARD J. BOYD, V, ESQ.
Acting United States Attorney

CLERK OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- : AFFIDAVIT

RAYMOND ARGRO, : 66 CR 314

Defendant. :

----------X

STATE OF NEW YORK) SS:
COUNTY OF KINGS)

EDWARD J. KELLY, being duly sworn, deposes and says:

1. He is an attorney associated with ROBERT KASANOF, ESQ., Federal Defender Services Unit/The Legal Aid Society, attorney of record assigned to represent the defendant herein, RAYMOND ARGRO.

2. This affidavit is submitted in support of a motion for an order (1) granting a further stay of the defendant's removal from Federal Detention Headquarters pending final determination of this motion and parole revocation proceedings (2) directing that said parole revocation proceedings be conducted at Federal Detention Headquarters, 427 West Street, New York, New York 10014 and (3) granting the release of the defendant on appropriate bail and conditions pending final determination of parole revocation proceedings; and for such other and further relief as to the Court may seem just and proper.

3. On December 21, 1973, Judge Dooling, after assigning this office to represent the defendant, signed an order staying the removal of the defendant from West Street until January 15, 1974. (Copy of order attached) This was done after the Court received a letter from the defendant, dated December 18, 1973, in which he indicated that he was to be removed to Lewisburg

for parole revocation proceedings, that the attorney promised him had not materialized, and that he was asking for a hearing at which bail would be set pending the determination of the revocation proceedings, for which no date had yet been set. (copy of letter attached)

4. The back ground of defendant's incarceration at West Street, while briefly set forth in defendant's letter, are here amplified on the basis of two interviews with him. On November 27, 1973, while at work at a service station where he was employed as a mechanic, the defendant was arrested by F.B. I. agents on a warrant charging him with violations of parole. (Copy of warrant attached) Taken to this courthouse, the defendant was interviewed by Miss Green of the Probation Department who discussed the charges with him. Apparently at this time or at a later interview, he as advised that an attorney would be assigned to him but his was not done until Judge Dooling took action on defendant's letter to him. Also at this or the later interview with Miss Green, the defendant denied his moral guilt on all the charges but did admit that he had been tried and convicted on a state charge of possession of dangerous drugs, sentenced to five (5) years, and that, release on a $5000.00 appeal bond, his case was now on appeal. Miss Green did not provide defendant with a copy of the warrant, after filling out some forms on the basis of the interview.

5. The defendant was then removed to West Street. On or about December 14, 1973, he had an interview with a Mr. Hasson, who is on the staff at West Street and deals with parole revocation matters. At this time, the defendant was advised that parole revocation proceedings would take place at West Street in January and he signed a form acknowledging this arrangement (copy

of form attached). Mr. Hasson advised the defendant that if he had not been assigned an attorney by the Wednesday after Christmas, Mr. Hasson should be advised and he would contact the Court. The defendant wrote his letter to Judge Dooling on Decmeber 18, 1973 when he was still without counsel and had just been advised by Mr. Hasson that the parole proceddings would not take place at West Street but rather at Lewsiburg, to which the defendant was to be removed shortly. When the defendant, having heard about Morrissey v Brewer from another inmate, inquired about his right to the two pronged proceedings enunciated therein, he was told by Mr. Hasson that he had had his preliminary hearing when he spoke to Miss Green on two occasions and that in view of his admission to her of his legal conviction, the Board of Parole had directed his removal to Lewisburg for final parole revocation proceedings.

6. The defendant was scheduled to leave on a bus for Lewisburg on the evening of December 21, 1973. However, because of defendant's indication that his brother was coming from Virginia for a visit and the intervention of Judge Dooling's order the defendant was not removed and has remained at West Street to date. He was interviewed there by counsel or January 3, 1974 and January 8, 1974.

7. On January 7,1974, the defendant was notified that his mother, Gladys Argro, had died in Virginia after a long illness and was advised that he would be permitted to go there on January 10, 1974. However, on January 8, 1974, he was told by Mr. Hasson that such a trip would be permitted only if the defendant paid in advance the air transportation charges to Virginia and return for himself and the escort. The defendant indicated this in a telephone call to counsel on January 8, 1974 and stated that he had no money available for this purpose. Subsequent information

provided by a friend of the defendant indicated that if released without escort the defendant would be able to get to Virginia and back on his own.

Why this man was not furloughed according to 18 USC §4082 and other statutes is bothersome because he was at liberty on bond during his state case, was granted an appeal bond, after conviction, knew of the inevitably of a parole violation since 1972 and, nevertheless, never fled this community where his residence and work roots have existed since his release on parole. Counsel believes this episode is relevant because, taken with the sham "preliminary hearing" he had before Miss Green, it indicates, at best, an insensitivity to the defendant's sensibilities and rights.

8. Counsel contends that (1) the defendant should not be removed until final determination of this motion and of the parole revocation proceedings (2) these parole revocation proceedings should take place at Federal Detention Headquarters in this city and (3) the defendant should be enlarged on bail pending final determination of the parole revocation proceedings.

9. Contentions (1) and (2) above will be considered here as interrelated. Although §§4205 and 4206, which provide for the retaking of a prisoner for parole violation and §4207, which provides for an appearance before parole authorities after retaking, do not specify where the prisoner is to be confined and where parole revocation proceedings should take place, it made good sense, long before the teachings of Morrissey v Brewer, 408 US 471 (1972), with support in the case law, e.g. Hyser v Reed, 318 F. 2d 225 (DC:1963), that the proceedings should take place at a site near where the alleged violation occurred. It's obvious

that this is where evidence, whether testimonial or documentary, is most conveniently available to both the Board and the prisoner. To hold the proceedings at a distant place from the violation, while it may cause some inconvenience to the Board, is most prejudicial to the prisoner who is without the resources of his accuser. If the prisoner is to raise any meaningful defense to the charges, he should be accorded a hearing where he is best able to obtain the assistance he requires.

The reasonableness of this now enunciated in Morrissey v Brewer, 408 U.S. (1972) 471, 496, where the Court states:

> ...due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.

The Court then goes on to enumerate what notice the defendant is to be given, what types of information he may adduce at the hearing, and what record is to be made of the proceedings. While the Court, in continuing with the rubrics of the revocation hearing itself, does not indicate where it should take place, it seems implicit that the same due process, which required the preliminary hearing to take place at or near the place of the alleged violation, would entail a fortiori the hearing in chief to be held at the same or a nearby site so that the prisoner could most conveniently and adequately raise his defense.

10. It is clear in defendant's case that all the resources by way of testimony or documentation which he needs are more available here than would be the case if he were transferred to Lewisburg, Pennsylvania. His conviction took place in Binghamton where his nearest relative, a brother, resides; that is where the

gun violation charge arose; he was supervised in this district and this where parole records and parole supervisors are; friends and employers, his residence, and his job site are all in this area. He would be severely prejudiced if the revocation hearing were held at Lewisburg.

11. The next requirement is, of course, that all the proceedings, both the preliminary hearing and the revocation hearing, be strictly controlled by the guidelines set forth in Morrissey v Brewer, 408 U.S. 471, 485-489 (1972). None of the procedures and rights delineated in that case were afforded the defendant when he had his so-called "hearing" before Miss Green. That this should occur doesn't come as a complete surprise to counsel since, in his recent representation of a parole violator at West Street, the Board members, when I mentioned the case, seemed to be hearing about it for the first time. After giving polite attention, disinterest set in and they got on with things as they intended in the first place. While this was tolerated by counsel because the prisoner was eager to have his parole revoked in order to avoid incarceration on the state charge for which he had been charged as a parole violator, the same situation will not be countenanced here where the defendant desires to vigorously defend himself against the charges.

12. Counsel, finally, contends that, pending the ultimate determination of the parole revocation proceedings, the defendant should be released on appropriate bail. That the defendant is a good bail risk is supported (1) by his record im prison (2) by his history while on parole and (3) the nature of the charges and his defenses thereto.

13. Following his sentence on November 18, 1966 for armed bank robbery, to which he had pleaded guilty, the defendant was committed to the federal penitentiary at Terre Haute, Indiana. During the approximately four (4) years he spent there, he completed his high school education and obtained three college credits at Indiana University. He learned the mechanic's trade and ultimately participated in a work release program through which he was able to send money home to his wife and children. He also involved himself in group therapy activities where he learned about himself and his relationship to others. His record at Terre Haute was in all respect a praiseworthy one and, when he was released on November 23, 1970, indicated an individual who had been fully rehabilitated.

14. After about two (2) months at home, during which he was unable to find work, his wife, who had become involved with another man during his prison term, abandoned the defendant and their three children, after withdrawing all the money in the bank and leaving the defendant saddled with debts. Fortunately, the defendant found work as a mixer at the Nancee Paint Company in Farmingdale and, with the assistance of friends, was able to make ends meet and care for the children. About a month later, he obtained aposition as an auto mechanic at the Hillside Service Center in New Hyde Park and continued to be employed there or at other affiliated stations until he was arrested on the parole violation warrant on November 27, 1973. At the end of the school year of 1971, he sent his children to live with his sister in Richmond, Virginia and supported them regularly until his present incarceration. This support was accomplished by his paying regularly an amount into Court-he became legally separated from his

wife in July, 1972-and sending additional amounts of money when and as required. He has been keeping company recently with a Lugene Hudzinski, who is a technician in a laboratory. Their affection for each seems genuine and mature. Therefore, in counsel's view, the defendant's residence in this area, his work record here, his shouldering the responsibility of supporting his children, and his firm relationship with Ms. Hudzinski, who lives and works in this area, are all reasons which militate against filight if he is released or bail.

15. To conclude this phase of the argument, the Court is reminded that, during the course of his tate trial, the defendant was released on bond, was released on appeal bond following his conviction and sentence of five (5) years, knew the inevitability of a parole violation as early as July 1972, yet did not flea and, in fact was working on his job when arrested on the parole violation warrant.

16. Finally, counsel believes the Court, in determining the bail issue, should consider the nature of the parole violation charges and the proposed defense to each of them by the defendant. The following account is based on information provided by the defendant.

17. With respect to the drug conviction, defendant advises that, while on a trip to Binghamton to visit his brother, he and a companion, Russell Cain, whom the defendant had known for some years and who was the owner and operator of the car, were approached by police officers at a filling station in the environs of Binghamton. Although there was apparently no prior information known to the police about the occupants or the car, the officers

seemed intent on a search of the car which they accomplished, although the papers of both the defendant and Cain were prior thereto determined to be in order. According to the testimony at trial, the officers found a small vial of marijuana on the front seat between the defendant and Cain and a quantity of glassine envelopes containing heroin in a bag in the rear of the car on the floor in front of the seat.

The issue of probable cause was determined adversely to the defendants and the evidence admitted at trial. Over the objection of counsel, the marijuana vial was introduced, although there was no charge concerning it in the indictment. The defendant and Cain both took the stand and denied knowledge of the contraband's presence in the car. On cross examination, the Court permitted the eliciting of information about the defendant's conviction for robbery, that he was a parolee and that he had on occasion smoked marijuana. The prosecutor, when Cain testified, elicited, with the approval of the Court, a prior conviction in 1961 for a Dyer act violation on which Cain had received a suspended sentece. The defendants were convicted and each sentenced to five (5) years.

This case is currently on appeal to the appropriate Appellate division of the State of New York.

18. Concerning the gun charges, the defeant indicates that, after he had been hospitalized in Binghamton for nine (9) days because of a stomach ailment, he, a female companion and his brother and the latter's wife stopped in a bar for a few drinks prior to the defendant's returning to his home here. While on the way to the men's room, the defendant and his brother were confronted by an apparently drunk indiviual who brandished a gun at

them, because earlier this person had made some insulting remarks about the defendant's companion and had been admonished for this by the defendant. The defendant knocked the gun from the man's hand and, as he was about to leave for home, gave the gun to his brother for safe keeping. The drunk was thereafter ejected from the bar and the defendant's brother retained the gun and took it home with him. A few months later, the brother had an argument with his wife which became heated enough for someone to call the police. In some manner, the gun was seized by the police and the brother gave a statement concerning the manner in which it had come into his possession, thus involving the defendant. Apparently a charge was lodged against the defendant which he did not become aware of until he was arrested on the drug charge.

This case is currently in the course of being dismissed. Attached hereto is a copy of a letter from defendant's Binghamton counsel to this effect.

19. With respect to being outside the district without permission, the defendant advises that with the approbation of his then parole supervisor, Mr. Morris, he made frequent trips to Binghamton to visit his brother and family and Ms. Madzinski, who resided there. According to the defendant, he had an agreement with Mr. Morris that the latter would be advised in advance of the trips for appropriate permission, but, if for some reason, contact could not be made with Mr. Morris, the defendant could proceed to Binghamton and report the trip in his next report to Mr. Morris. The defendant indicates that a study of his reports to Mr. Morris will confirm this arrangement and make valid any of the trips he made outside the district.

20. With respect to being associated with a person engaged in criminal activity, it has already been noted that at

trial both the defendant and Cain denied their guilt. Although the defendant had known Cain since 1961 and had become good friends with him-indeed, it was Cain who helped the defendant get his job as an auto mechanic-the defendant knew nothing but good about Cain and did not even know of his Dyer act conviction until after the arrest on the drug charge.

21. In view of all these facts and circumstances, counsel would urge the Court to consider bail for the defendant and grant it in appropriate measure. Prior authority for this is contained in Judge Dooling's decision in United States v Harold Schrieber, 73 C 1830, decided December 17, 1973 (Copy of memorandum/order attached). While the nature of the violation etc. in defendant's case are obviously distinguishable from Schrieber, the precedent for setting bail is there and much of what the Court said is applicable to the posture of defendant's case. See United States v Schrieber, p.4 last paragraph. The defendant's conviction may be reversed and the indictment dismissed as to him or a new trial ordered. Indeed, given the nature and value of the other violations relative to the drug charge, and defendant's defense to them, it appears precipitous on the part of the Board of Parole to go forward with their proceedings before the exhaustion of appellate remedies on the drug charge. Is it proper to continue the defendant's incarceration on the drug charge which may well be reversed or on the other violations, the explanation of which may be acceptable to the Board?

22. WHEREFORE, it is respectfully urged that the defendant's motion be granted in all respects, i.e. (1) that his removal from West Street be stayed pending determination of this motion and final parole revocation proceedings (2) that all parole revo-

cation proceedings take place at West Street and (3) that defendant be released on bail pending final determination of this motion and parole violation proceedings.

EDWARD J. KELLY

Sworn to before me

This 15th day of January 1974.

MARION SELTZER
Notary Public, State of New York
No. 03129375
Qualified in Kings County
Commission Expires March 30, 1...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

RAYMOND ARGRO, :

Petitioner. :

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ORDER

Upon the application of the Federal Defender Services Unit/The Legal Aid Society, SIMON GREIN, of counsel, and upon reading the letter of the Petitioner sent to the Court on December 18, 1973, the Court feeling that there may be issues in relation to the Petitioner justicable in a local parole hearing, it is hereby

ORDERED that the Warden of Federal Detention Headquarters, 427 West Street, New York City retain the said RAYMOND ARGRO at Federal Detention Headquarters, 427 West Street, New York City until January 15, 1974.

SO ORDERED

UNITED STATES DISTRICT JUDGE

DATED: BROOKLYN, NEW YORK
December 21, 1973

[illegible]

Honorable Judge
John L. Dooling

12-18-73

Your Honor

I appeared before you on November 18, 1964 to be sentenced to fifteen years with an A-2 number. Since that time, I was paroled on November 23, 1970.

Presently I am being held at the Federal House of Detention for Parole Violations. The violation stems from a charge that I was found guilty on and sentenced to on July 3, 1973. The charge I am presently appealing in the New York State Court system.

I was originally arrested on this charge on June 21, 1972, at which time I came out on a five thousand dollar bail. The Federal Parole Board issued a warrant violating my Parole on July 19, 1972, but held it in abeyance pending the out come of my case.

After my sentencing on the charge by the State Judge, my lawyer when he was the appeals court to file a motion for an

[illegible]

appeal, which was granted.

I then was granted an appeal back to the five thousand dollars an return to the court I might ask repeated to my parole officer under the assumption that conviction, along with sentencing would automatically send me back on Parole Violation. But I was informed by him that as long as a penal detainer has not been placed on my case, I would not be charged in an violation. Also he said that if there was a notice for my violation he would inform me as soon as I could turn myself in. On the 27th day of November two F.B.I. agents came to my job and arrested me for parole violation

Presently I am waiting for a revocation hearing that was to be held here at the Federal Detention Center in the month of January 1974. As of today that has been changed, because I have been informed that I will be sent to Lewisburg for this hearing, and they have no ideal when the Board will meet this again

I was informed by Miss Green of the Probation Department that I would be given a legal Aid lawyer to help me with this matter. I have been here for three week without

hearing anything from the legal Aid. That is why I am writing you at this time to ask your help. I am sent away from here. I don't know the legal channels that is necessary in order to appear & wait for the court to have a bail hearing. But I am praying your Honor that you can understand my situation & accept this letter as a form of a writ.

I have worked and maintained the same job from March 1, 1971 until the time of my violation I have maintained a constant monthly report with my state officer since my release from prison. I have nothing out of prison I have just my children associated in my name by my ex-wife and her boy-friend. I was deserted by my wife two months after leaving prison, and left with my three sons to take for. It wasn't easy for me to do, but some how I managed. Presently my kids are in Virginia with my sister, where their support is furnished by the State the Nassau County Children Court and there mine. I had my child on my own since I've been released from prison.

I am asking of you your Honor to consider

[A21]

sitting a bail fee me within my means, so as I can return to my home on Jek. on Continue to work on until my responsibilities until such time as a decision has been reached on my appeal.

I spoke with my parole agent W.A. Meyerson of the Nassau County Parole Department, who he told me he wouldn't have any objection to my coming out on bail, if it was at all possible.

Any verification of anything I have said, can be obtain from Miss Green of the Probation Department there in the eastern district, or from my Parole Officer Mr. Meyerson or the Homicide Office. who can be reached at 516-997-5726.

Any help or consideration that you could give me in this matter would be greatly appreciated.

My Institution number is 24577-135. my F.B.I. file no is 686 523 F

Respectfully Yours.
Raymond Capo

[#22]

H-20
(formerly Parole Form 33)
(Ed. Aug. 1966)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington

WARRANT APPLICATION

TO: United States Board of Parole. Date [illegible]

Case of [illegible] Reg. No. [illegible]

Race [illegible] Birth Date [illegible] FBI No. [illegible]

Sentence [illegible] District from [illegible]

Original offense [illegible]

Sentence began [illegible] Released [illegible]

District to [illegible] Transferred to [illegible] Parole [illegible]

Violation date [illegible] Termination date [illegible]
1.72

A United States Probation Officer will interview persons designated by the alleged violator and record a summary or digest of their statements bearing on the alleged violation.

Charges:

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

Date Warrant Issued [illegible] Warrant recommended by:

District to which sent [illegible] Parole Program Division Executive

PRISONER'S COPY

[illegible]

Example Form I-24
(Rev. Oct. 1973)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

NOTICE OF PAROLE CONSIDERATION HEARING

TO:

You are hereby notified that a hearing in your case will be held during the week of _____, 19__. The hearing will be held in the Parole Board Room at _____.

At this hearing you may have a representative who will be permitted to make a statement related to your case at the end of the hearing or you may waive representation and present your own case at the institutional hearing.

You will be advised of the decision in your case, in writing, within 15 working days of the hearing (except in emergency situations). If parole is denied, the reasons for the denial also will be given in writing.

Within 30 days after the entry of the order, you may request an appeal to the Parole Board's Regional Member. Your request must be in writing and filed with the Chief C&P. Forms for this request are available at the Chief C&P's office in your institution.

Your appeal request will be considered by the Regional Member who may (1) send your case back to the institution for a rehearing, (2) schedule an appeal hearing at the regional level, (3) modify the decision, or (4) affirm the order. You will be afforded an opportunity to appear only at an institutional rehearing. However, if an appeal hearing at the regional level is granted, you may have a representative speak for you or you may request a regional appeal on the record only.*

If you have further questions concerning the procedures, consult your caseworker.

* The above provisions do not apply to en banc cases. An appeal may be taken in en banc cases within 7 days from entry of the Regional Board Member's decision to the National Appellate Board. The National Appellate Board may affirm the order or schedule an appeal hearing before the next meeting of the full Board. If an appeal hearing is granted, you may have a representative speak for you or you may request an appeal on the record only.

12-14-73
Date received

Signature and Register No.

ORIGINAL TO FILE JACKET - COPY TO PAROLE APPLICANT

[illegible]

A. JACK RAPPAPORT
ROBERT B. KAMAN
THOMAS J. HULL
MARK L. RAPPAPORT

RAPPAPORT, KAMAN & HULL
ATTORNEYS AT LAW
11 CONGDON PLACE
BINGHAMTON, NEW YORK 13901
PHONE (607) 722-6423

WHITNEY POINT OFFICE
MAIN STREET
WHITNEY POINT, N. Y. 13862
PHONE (607) 692-3380

January 3, 1974

Mr. Raymond Argro
427 West Street
New York, New York 10014

Dear Raymond:

Please forgive me for not responding sooner but I was having difficulty ascertaining the gun charge that was still pending against you in Broome County Court.

I just learned from the Assistant District Attorney that this case was not going to be prosecuted and would be abandoned, and the Assistant District Attorney is going to send me a letter to that effect.

I tried to call the Department of Justice to convey this information but there was no answer.

I sincerely hope that this can be of some assistance to you.

Sincerely yours,

RAPPAPORT, KAMAN & HULL

By: A. JACK RAPPAPORT

AJR/jmp

[A25]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

THE UNITED STATES OF AMERICA,

- against -

HAROLD SCHRIEBER,

Defendant.

- - - - - - - - - - - - - - - - - -x

No. 73-C-1830

MEMORANDUM
and
ORDER

E.D. N.Y
DEC 17 1973

Appearances:

JAMES PASCARELLA, ESQ. (EDWARD J. BOYD V, United States Attorney, of Counsel) for the Government

LOUIS J. MILONE, JR., ESQ. (Messrs. MORGAN and CELFI, of Counsel) for defendant

D O O L I N G, D.J.

Released on parole from the Federal Correctional Facility at Danbury, Connecticut, on December 4, 1972, defendant was indicted in Nassau County for possession of stolen property and for felonious possession of a weapon, and he was released, on May 25, 1973, upon giving $1,500 cash bail. On November 19, 1973, defendant pled guilty to criminal possession of stolen property in the third degree, in satisfaction of all outstanding state charges, and he was continued on bail (2) until sentence day, January 9, 1974. Evidently the United

[A 26]

States Board of Parole then issued a warrant for the retaking of the defendant as a parole violator. In view of defendant's plea of guilty in state court, he, no doubt, can no longer contest the fact of parole violation. Mainer v. United States Attorney General, 5th Cir. 1970, 429 F.2d 389,391. The issue defendant's application presented is whether there is authority for admitting him to Cust[illegible], and, whether, if there is, he should be admitted to bail until his parole hearing, which, in this case, almost certainly, will deal not with the probably undeniable fact of violation, but with the disposition to be made on the basis of the violation, its nature, its circumstances, the terms of the state court sentence and other factors relevant under 18 U.S.C. §4207. The probation officer indicates that, subject of course to the decisions to be made in the state sentencing proceeding and in the Parole Board hearing, there is no reason why defendant should not be regarded as a good bail risk if bail is available at all.

Morrissey v. Brewer, 1972, 408 U.S. 471, outlines the undeniable minimum of due process rights that an alleged parole violator possesses, and they relate in large part to assuring a fair hearing on the fact of violation (408 U.S. at 488-48). But the Court is clear that the revocation process

[illegible]

involves two distinct issues, first, violation and, second, the wisdom of recommitment (408 U.S. at 479-480). The Court discarded as useless resort to a "right" or "privilege" analysis, holding that the parolee's "liberty is valuable and must be seen to be within the protection of the Fourteenth Amendment" (408 U.S. at 482). The Court held open the question whether indigent parolees are entitled to assigned counsel, and did not consider the question of bail at all. Mr. Justice Douglas, dissenting in part, expressed the view that there should not be recommitment before final hearing if there is no new criminal offense but rather an infraction of other parole conditions (408 U.S. at 497), echoing a view of Judge Skelly Wright expressed in a concurrence and dissent in Hyser v. Reed, D.C.Cir. 1963, 318 F.2d 225, 262 (Judge Wright assumed that in the case of a new offense the defendant would be in custody, perhaps thinking that the bail issue would be mooted). Cf. United States ex rel. Buono v. Kenton, 2d Cir. 1961, 287 F.2d 534 (habeas corpus appropriate where violation hearing too long delayed); United ex rel. Vance v. Kenton, D.Conn. 1966, 252 F.Supp. 344 (same).

Defendant must accept, as In re Whitney, 1st Cir. 1970, 421 F.2d 537, holds, that a parolee may have no Eighth

Amendment right to bail (although it appears unsound to put it on the ground that, unlike an indicted defendant, a parolee is not presumed to be innocent: an indicted defendant is one whom a grand jury has found reasonable ground to charge with a felony; the presumption of innocence functions when the trial commences to locate the burden of proof and the measure of proof required; it is not a presumption of rational inference from facts, such as that most indicted defendants are found not guilty if fairly tried; the exact contrary appears to be the statistically supportable inference). But that neither decides that there is no power to admit to bail nor excludes the conclusion that due process certainly commends if it does not require consideration of the question whether this defendant should not be admitted to bail if the individual circumstances of the defendant's case make postponement of recommitment until the Board of Parole acts the course which a careful weighing of the values involved dictates.

Here, the state court, knowing defendant's situation and having taken his plea, has continued him on bail. Flight, then, is not anticipated. Ultimate state incarceration or federal recommitment are not inevitable. The family circumstances of defendant are peculiarly difficult, and yet they

furnish further assurance of his continuing availability. It is unlikely that the Board of Parole would find it judicious to conduct its hearing until after the state court has sentenced on January 9, 1974. In these circumstances, admission to reasonable bail, neither expressly authorized nor forbidden by a close reading of 18 U.S.C. §§4205-4207 and 18 U.C.C. §§ 3141-3152 (cf. Baker v. Sard, D. C. Cir. 1969, 420 F.2d 1342), is appropriate.

It is, accordingly,

ORDERED that defendant be released from custody upon his execution of an appearance bond in the amount of $15,000 secured by the deposit of $1,500 in cash in the registry of the court, substantially in the form provided under 18 U.S.C. §3146(a)(3).

Brooklyn, New York
December 17, 1973

U. S. D. J.

[030]

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 03 CR 314 Year 19 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

EDWARD LEE,

Defendant.

MOTION

[illegible]
[illegible] Division Unit/
[illegible]

Office and Post Office Address, Telephone

26 Court Street, Suite 701
Brooklyn, New York 11242

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

RAYMOND ARGRO, :

Petitioner, :

- against - : 74-C-143 (66-CR-314)

UNITED STATES OF AMERICA, : MEMORANDUM and ORDER

Respondent. :

- - - - - - - - - - - - - - - - - - - X

APPEARANCES:

EDWARD J. KELLY, ESQ. (FEDERAL DEFENDER SERVICES UNIT, The Legal Aid Society, of Counsel) for Petitioner-Defendant-Parolee.

KENNETH J. KAPLAN, ESQ. (EDWARD J. BOYD, V, ESQ., United States Attorney, of Counsel) for the Government.

DOOLING, D.J.

This is, in essence, a parolee's application for an order requiring his parole revocation hearing to be conducted locally (28 C.F.R. § 2.43(b)), and for admission to bail pending determination of the issue of parole revocation.

The petitioner was indicted for bank robbery on July 28, 1966 (66-CR-314), and on his plea of guilty to one count of the indictment he was, after a commitment

under § 4208(b) of Title 18 for study and report, sentenced on February 28, 1967 to serve a term of 15 years pursuant to 18 U.S.C. § 4208(a)(2). His commitment dated from his arrest. Petitioner was released from federal custody on parole under the provisions of § 4208(a)(2) on November 23, 1970. Subsequently, petitioner obtained and apparently retained employment in this District until the events now to be referred to.

It appears that with the permission of his parole officer, Mr. Meyerson, of this District's Probation Office, petitioner from time to time visited Binghamton, New York, where his brother lived and he had a friend or acquaintance, Russell Cain. On June 21, 1972, while in Binghamton without the express prior permission of his parole officer, petitioner was arrested on a charge of possessing dangerous drugs. That arrest caused the Board of Parole, on July 19, 1972, to issue a warrant (18 U.S.C. § 4205) charging the parolee with the arrest for possession of dangerous drugs, possession of a weapon (two charges), association with a person engaged in criminal activity, and leaving the district without permission. The warrant issued to the Marshal at Utica, New York, with direction to place a detainer at Attica State Prison. The parolee

was not incarcerated there but was at liberty on the State charge on $5,000.00 bail. Nothing further was done to execute the warrant and the parolee continued at liberty until his trial and conviction of the State charge of possessing dangerous drugs. On that charge he was sentenced on July 30, 1973, to serve a term of 5 years in State Prison. On the parolee's application he was admitted to bail pending appeal. His appeal is still pending and undecided, and no statement has been made about when it can be expected to be determined.

No action was taken on the federal parole violation charges until on November 27, 1973, the parolee was arrested at his place of employment by two representatives of the Federal Bureau of Investigation and taken to West Street. Apparently the arrest was on the July 19, 1972 warrant. The "Warrant Application" advises the parolee that

> "A United States Probation Officer will interview persons designated by the alleged violator and record a summary or digest of their statements bearing on the alleged violation."

When the parolee reached West Street he was interviewed by Probation Officer Beverly F. Greene, who is a Probation Officer other than the Probation Officer

supervising parolee's parole. She interviewed the parolee on two occasions: the warrant was not in her possession at the time of the first interview, and when it arrived, she found it necessary and proper to accord the parolee a second interview. A report of the interview was then prepared and sent to the Parole Executive, James R. Pace, but it does not appear that any copy of it was furnished to the defendant, nor is it shown that it incorporated a determination of probable cause to hold the parolee for the final decision of the Parole Board on revocation or a statement of the reasons for that determination (cf. Morrissey v. Brewer, 1972, 408 U.S. 471, 487).

It does not appear that at the interview Miss Greene made clear to the parolee that she would determine whether he should be held for a revocation hearing and whether it should be held locally and that he could bring in witnesses and documents. See August 9, 1972, "New procedures" memorandum of Chairman Maurice H. Sigler of the Board of Parole. Miss Greene did, in the report that she sent to the parole executive, state that at the first interview the parolee admitted his conviction in Binghamton, New York, and his association with a person

engaged in criminal activity, but denied leaving the district without permission. She said that the parolee then executed Parole Form F-2 on which he indicated a desire that his revocation hearing be held in a federal institution, and that he also executed a C.J.A. Form 22 on which he requested the District Court to appoint counsel for his revocation hearing. When Miss Greene received the warrant on November 29th, she found that it included two additional charges that had not been discussed, and, therefore, interviewed the parolee for a second time. She reports that after the parolee read the warrant application he denied all five charges and changed Parole Form F-2 so as to ask for a local revocation hearing. She added that the parolee denied the five alleged violations, but added an explanation respecting the conviction for criminal possession of a dangerous drug. The parolee admitted that he had been arrested in Binghamton on June 21, 1972, and had been convicted "6/21/73" (a probable mistake in dating), but stated that since his case was on appeal he should not have been violated on the charge before the conviction was affirmed. As to the two-fold charge of illegal possession of a weapon and unauthorized possession of the same weapon (as

a parole violation), the parolee denied that he ever owned a gun, and asserted that in February of 1972 local authorities located the gun in his brother's house (inferentially in the parolee's absence) and that it was possible that his brother had advised the police that the parolee owned the gun. Miss Greene added that the case record entries indicated that in February 1972 the .22 caliber gun was found in the parolee's brother's home and that on May 29, 1972 the parolee's brother had signed a deposition stating that the parolee owned the gun. It does not appear that this information was disclosed to the parolee. With regard to association with a person involved in criminal activity, the parolee stated that he was unaware of Russell Cain's previous arrest record until June 21, 1972, when they were both arrested on the drug charge. And, finally, with respect to leaving the district without permission, the parolee explained that he had been granted approval to travel to Binghamton on certain specific occasions but that he had not requested approval to travel to Binghamton on June 23, 1972 but expected to do so as soon as he got back.

Government counsel obtained and presented the C.J.A. Form 22, as an exhibit. The form recites that the

defendant being under arrest for an alleged violation of parole in New York City, acknowledged that he had been fully advised by his probation officer that he was charged with a parole violation as set forth in the warrant which had been read to him, that the probation officer had fully explained "that I may be afforded a revocation hearing by the United States Board of Parole either locally near the place of my alleged violation at _____ _____, or upon my return to a Federal institution." The C.J.A. Form 22 indicates that the parolee requested that the hearing be held locally, represented that he could not afford counsel and requested the Court to appoint counsel to represent him at his revocation hearing before a representative of the United States Board of Parole, stating that he wished to contest all five of the charges. The Form 22 asks for the post-release conviction status of the parolee, and petitioner stated that he had been convicted of the offense of possession of dangerous drugs, but added "Case is under Appeal."

The C.J.A. Form 22 was filled out under date of November 29, 1973, and witnessed by Miss Greene.

Under date of December 14, 1972, the parolee apparently receipted for a "NOTICE OF PAROLE CONSIDERATION

HEARING" notifying him that a hearing in his case would be held during the week of "January 1974" in the parole board room at "F.D.H." The form advised the parolee of his appellate rights in cases of adverse determination (see 28 C.F.R. §§ 2.43(d) and 2.20, 2.21), and that at the hearing he could have a representative who would be permitted to make a statement related to his case at the end of the hearing, or might waive representation and present his own case at the hearing.

However, sometime before December 18, 1973, the parolee was ordered removed to Lewisburg, Pennsylvania, Federal Institution for his revocation hearing, and he was advised at West Street that presumably the change was because his statement had disclosed the conviction in Binghamton.

No counsel had been appointed for the defendant in the Southern District Court, presumably because there is no regular way of implementing the request in present administrative procedures. Defendant turned to this Court, as the court of his conviction, and the Federal Defender Services Unit of the Legal Aid Society consented to act in an emergency capacity. A stay of removal to Lewisburg was signed on December 21, 1973, and since that

date the United States Attorney's office has cooperated in retaining the defendant here at West Street, while insisting that the procedures already taken and under way reflect the fullest compliance with the requirements both of the parole regulations (revised September 14, 1973, 38 F.R. 26,652-26,657) and the teaching of Morrissey v. Brewer, 1972, 408 U.S. 471.

The regulations governing parole, release, supervision, and recommitment of prisoners appear in 28 C.F.R. §§ 2.1 and following. Section 2.38 provides that if a parolee violates any condition under which he has been released "and satisfactory evidence thereof is presented to the Board, or a member thereof, a warrant may be issued and the offender returned to an institution." Section 2.41 provides that any Federal officer authorized to serve criminal process within the United States to whom a warrant shall be delivered shall execute it by taking the prisoner and returning him to the custody of the Attorney General. Section 2.43 then provides:

> "(a) A prisoner who is retaken on a warrant issued by a Board Member shall be given a preliminary interview by an official designated by the Board. This preliminary interview shall be held prior to the possible return of the prisoner to a Federal institution.

Following receipt of a summary or digest of the preliminary interview, the Board or a member thereof, unless he decides to reinstate the prisoner to parole or mandatory release supervision, shall give the prisoner an opportunity to appear at a revocation hearing before a hearing examiner panel designated by the Board.

(b) If the prisoner requests a local hearing prior to his return to a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met: (1) The local hearing would facilitate the production of witnesses or the retention of counsel; (2) the prisoner has not been convicted of a crime committed while under community supervision; and (3) the prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution.

(c) Following the revocation hearing, parole or mandatory release may be reinstated, revoked, or the terms and conditions thereof may be modified. If the parole or mandatory release is revoked, the prisoner shall receive a written statement of the reasons for revocation and the evidence upon which the decision was based. Whenever parole or mandatory release is revoked, the prisoner may be required to serve all or any part of the remaining term for which he was originally sentenced, less such good time as he may earn following his recommitment."

The parole regulations have been revised since and in the light of Morrissey, and over a year before that

revision, on August 9, 1972, the Chairman of the Board of Parole had promulgated "New procedures" in consequence of Morrissey. The "New procedures" memorandum visualizes a preliminary interview "in the same manner as heretofore, including furnishing to the alleged parole or mandatory release violator of forms F-2, to determine the matter of local v. institutional hearing, and the C.J.A. Form, to determine the question of whether the alleged violator wishes to request appointment of counsel. This preliminary interview, however, must be conducted by a Probation Officer other than the one who had been supervising the alleged violator and who has recommended the warrant." (Underlining in original.) The memorandum explains that the violator should be told at the preliminary interview that it will determine whether he should be held for revocation hearing and if so whether that hearing should be local or at the institution from which he was released. The memorandum continues:

> "These determinations will be made pursuant to a summary of the interview, and a recommendation, which will be forwarded by the interviewer to parole headquarters at Washington."

The memorandum then continues:

> "The alleged violator should be further advised that if he has not been convicted of a new criminal offense while on supervision, and if he also denies all of the charges of violation, he is entitled to bring to the preliminary interview documents or witnesses in his behalf. Further, he may request that the probation officer . . . ask adverse witnesses, including his supervising Probation Officer whose testimony would favor revocation, to appear at the hearing. The witnesses would then be available for crossexamination."

The memorandum notes that the probation service and Parole Board can only request witnesses to appear and cannot compel attendance and adds that probation officers would attend as witnesses on request. The summary of the preliminary interview is to include the substance of the documents in evidence of support of revocation and in support of the parolee's position, and, "The recommendation should include the reasons and evidence which support it."

The next provision of Chairman Sigler's memorandum is of high interest:

> "If the new rights, outlined above, should be requested by the alleged violator, such as bringing his witnesses or documents or requesting confrontation and crossexamination of adverse witnesses, it could cause a postponement of the preliminary interview. If such a postponement should make it possible to have present all materials and persons requested, including, e.g., retained or appointed counsel, if any,

> this postponed preliminary interview could then be conducted as a revocation hearing, by an examiner designated by the Board, provided that arranging for an examiner's presence does not cause further delay in the hearing."

The remaining provisions relate to the detail of local revocation hearings. The memorandum of Chairman Sigler is emphatic and clear in reiterating the point included in 28 C.F.R. § 2.43(b), quoted above:

> "However, [the parolee] is not entitled to this right [confrontation with and crossexamination of adverse witnesses] if he has been convicted of a new offense or if he admits any of the alleged violations of his parole or mandatory release."

This is followed with the sentence:

> "Thus the criteria for confrontation and crossexamination correspond exactly with the qualifications for a local revocation hearing."

There is an additional provision in Chairman Sigler's memorandum which should be noticed: it requires the parolee entitled to a local revocation hearing who waives that local hearing, to be advised that if he does that, he must then waive his right to request confrontation and cross-examination of adverse witnesses. "In other words, confrontation and crossexamination of adverse witnesses can be had only at a local hearing."

(Compare 28 C.F.R. § 2.44(c), which, when read with Section 2.43(b) seems to deny the rights of confrontation and cross-examination in hearings conducted in the institution where the parolee was formerly imprisoned only if he does not deny the charges or has a post-release conviction.)

The petitioner essentially seeks as relief, first, a local hearing rather than a hearing at Lewisburg, so that he can present such local evidence as he may have without imposing needless cost - which he may be unable to defray. Second, he seeks to be released on bail until his status as a parole violator has been determined and recommitment ordered, either on the basis of the final affirmance of his State conviction, or on the basis of one of the other charges of parole violation. All five charges are still open charges. While the State seems ready to abandon the charge of criminal possession of the weapon, the Board can still inquire into that charge and, of course, into the charge of possessing a weapon in violation of his parole conditions. Indeed the reversal of the State conviction would not preclude the Board from determining the dangerous drug matter as a parole violation on the evidence made available to the Parole Board.

The Government's first contention is that the fact of conviction, both under 28 C.F.R. § 2.43(b) and under Morrissey (408 U.S. at 490), precludes the parolee from obtaining a local hearing as a matter of right, and that under the "New procedures" memorandum the fact of conviction also deprives the parolee of the right to present documents and voluntary witnesses to his preliminary interview nor claim the right of confrontation and cross-examination. Hence, it is argued, the preliminary interview as given by Miss Greene on two occasions, and the transfer of the locus of the revocation hearing to Lewisburg are amply justified both under Morrissey, under the regulations and under the "New procedures" memorandum. The Government further argues that if there has been some failure to meet the standards of the reasonable regulations and the "New procedures" memorandum then, before proceeding in court, petitioner must exhaust his administrative remedies. The difficulty with the latter contention is twofold, first, that the appeal provision contained in Rule 2.43(b) is only from the decision rendered in the revocation hearing and does not relate to matters having to do with the securing of an adequate hearing under Rule 2.43(b). The second difficulty is

with the assumption that a conviction which has been appealed with bail allowed pending appeal is a "conviction" in the sense of Rule 2.43(b)(2). It must be supposed that Rule 2.43(b)(2) means such a conviction as puts guilt, and therefore parole violation, beyond question, and, hence, leaves open only the Board's determination to reinstate, revoke or modify the parole terms and conditions. Morrissey assumed, in referring to conviction, that there would be no necessity for relitigating the facts (408 U.S. at 490). But where the conviction is on appeal and reversal is a possibility, the revocation hearing held at the institution will retrospectively be set at naught in the case of a reversal, and if adequate justice is to be done, the Board of Parole would then have to reconvene the hearing, and reconsider the charge of parole violation on the evidence available to it. That would be the sort of hearing visualized as appropriate for local conducting, since it calls for the presence of witnesses, and the right of confrontation and cross-examination. Hence, the fact of the pending appeal should properly have been taken into account in structuring the preliminary interview. It is a fact which, taken with others, might well produce the conclusion on

preliminary review or in local hearing that the Board of Parole should withhold action pending the outcome of the appeal provided it was not frivolous and was pursued diligently. Certainly purposive delay would be intolerable The alternative course would be to put the conviction matter to one side and inquire into the gun charges and the charge of consorting with Russell Cain, both of which would appear to lend themselves to local hearing, and the charge of leaving the district without permission.

The Government argued further that the Court is wholly without the power to grant bail in the present situation and could intervene, on a jurisdictional basis of substance, only if the detention of the defendant was an illegal detention, which the Court would be required to relieve against through habeas corpus. There is much doubt and uncertainty about the place of bail in the relatively new field of inquiry into parole granting, parole revocation and recommitment opened by the Supreme Court in Morrissey and in Gagnon v. Scarpelli, 1973, 411 U. S. 778. For the reasons set forth in the memorandum in United States v. Schrieber, 73-C-1830, it is concluded that, while there is no Eighth Amendment right to bail in the case of a parolee who is charged with violation,

there is a power to admit to bail in a proper case. The contrary determination in People ex rel.Skinner, 1973, 33 N.Y. 2d 23, is, indeed, a strong authority, but the court, while denying a constitutional right to bail, put its unwillingness to grant bail on the ground that bail had to be authorized by statute, and it found that the New York statutes limited bail to criminal actions or proceedings, and it construed the statute as excluding parole revocation proceedings. The federal authorities have not gone that far.

Plaintiff's argument is complex and follows many paths, but the critical arguments can be considered in terms of whether or not the proceedings to date have reflected appropriate compliance with the provisions of 28 C.F.R. § 2.43(a) in the first instance, and a correct application of § 2.43(b)(2) in the further view of the matter. While Section 2.43(a) may not require an evidentiary-hearing type of preliminary interview before a probation officer, Chairman Sigler's "New procedures" memorandum of August 9th, in its first three numbered paragraphs, provides for an elaborated preliminary hearing before a disinterested probation officer with the opportunity accorded to the parolee to present witnesses

and documents. It is at the same time being explicit that the procedure is inapplicable in the case of a parolee who has been convicted of a new offense. It does not appear in the present case that Miss Greene told the parolee that he could present the material that the "New procedures" memorandum authorizes and Section 2.44(a), (c) appears to contemplate. Nor does it appear that the parolee was furnished with a copy of Miss Greene's report and recommendation to the Parole Executive. See "New procedures" memorandum, par. (4); Morrissey, 408 U.S. at 485-487; Gagnon, supra, 411 U.S. at 786 Cf. Section 2.43 (a). The procedure followed appears not to have conformed "to the nature of the process that is due, bearing in mind that the interest of both State and parolee will be furthered by an effective but informal hearing." (408 U.S. at 484-5). Nor did the procedure reach the kind of conclusion required by the procedural outline for the preliminary hearing given in Morrissey, 408 U.S. at 487:

> "The hearing officer shall have the duty of making a summary, or digest, of what occurred at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable

> cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in Goldberg, 'the decision maker should state the reason for his determination and indicate the evidence he relied on . . .' but it should be remembered that this is not a final determination calling for 'formal findings of fact and conclusions of law.'"

Miss Greene here did apparently report in accordance with the first part of the Court's outline, but is shown to have made that determination of probable cause which warrants continued detention, together with a statement of the reasons for the determination. The Court in the language quoted visualizes such a probable cause determination as a condition precedent to continuing detention.

No doubt the problem here is deeply involved with the second problem, that is, the effect on the shape of the entire revocation procedure and on the nature of the preliminary interview of the fact of the parolee's post-release conviction. Both Chairman Sigler's memorandum and Section 2.43(b) support the conclusion that the procedures elaborated preliminary interview and hearing procedures visualize only the case where parole revocation must depend for proof of violation on some-

thing other than a conviction. That is noted in Morrissey, 408 U.S. at 490. But the very fact that the conviction is treated as absolutely determinative of the issue of violation must lead to the conclusion that Section 2.43(b)(2) and the teaching of Morrissey have relation to final convictions and not to convictions which, although "final" in the court of instance, are on an appeal that is not frivolous. That is surely warranted where a New York State defendant has been admitted to bail pending appeal. Under New York Criminal Procedure Law, § 510.30, Sub. 2(b), an application for bail pending appeal requires the court to consider the likelihood of ultimate reversal of the judgment, and a determination that the appeal is probably without merit alone justifies, but does not require, a denial of the bail application whether or not, under the standards governing bail applications generally, the defendant would otherwise be entitled to bail (see § 510.30, Sub. 2(a)). Bail applications must be made on notice to the District Attorney with adequate opportunity to appear in opposition, and the bail order becomes inoperative after 120 days if there has not been a determination of the appeal unless it appears that the appellate court has postponed the

appeal and expressly ordered that the bail order shall continue to be operative. See New York Criminal Procedure Law § 460.50, Sub. 2, 3 and 4.

There is a second set of considerations not taken into account at all in the Section 2.43 provision limiting all cases of conviction during release to hearings at the institution from which the parolee was released. As the court in Morrissey made clear, and as the very structure of § 2.43 bears out, the procedure is essentially a three-step procedure comprised of (a) preliminary review to determine probable cause to detain, (b) hearing (local or institutional) to determine violation, and, (c) finally, making the decision, if violation has been found, to reinstate or revoke and if the latter, to fix the terms and conditions of recommitment. The prisoner under § 2.43, in case of a determination to recommit, is entitled to a written statement of the reasons for revocation and the evidence upon which the decision was based. Morrissey contemplates (408 U.S. at 488) that, even where violation is demonstrated or conceded, the parolee must have an opportunity to show mitigating circumstances which suggest that violation does not warrant revocation. See Gagnon, supra, 411 U.S. at 790-

791. In this view of the role of the revocation hearing, it is not apparent that interests of due process will in every case be adequately served by institutional hearing where, at least, the alleged parole violator is able to show that factors in mitigation can in his case best be demonstrated at a place nearer to his residence and work place during release, and nearer to the place of the alleged violation, provided no inordinate administrative inconvenience is imposed. Where, as may be the case here, the evidence in mitigation would very likely come from New York City, the center of a large metropolitan area, local parole hearings would not appear of necessity to impose any administrative burden. It might be hoped but it cannot be expected that the number of parole violation cases in the area will be too few to warrant regional hearings in this (and other) metropolitan centers.

When the parolee was admitted to bail in the State court, that must necessarily have been in the knowledge that he was a parolee and that his conviction, if affirmed, would constitute a major parole violation. While certainly no notice of his application for bail pending appeal was given by the parolee or his counsel to the Board of Parole or to the United States Attorney, the

circumstance that bail might be applied for and allowed was known to the Board of Parole, or, at least, it must be treated as knowing that, inasmuch as the parolee was allowed to remain at liberty on his State bail under continuing parole supervision for over a year before the warrant for his apprehension was acted upon. Mistake or oversight because of the Marshal's apparent ignorance of the parolee's location might explain the failure to execute the warrant, but it appears that the parolee was in regular report to his Probation Officer, charged with supervising his parole, throughout the period when he was awaiting trial. The Probation Officer may not have been furnished with a copy of the warrant or advised of its issuance, and Miss Greene did not have a copy of the warrant until after her first interview with the parolee. In any event, to incarcerate the parolee at this time is an administrative overruling of a judicial determination that the parolee should, at least in his role as a convicted defendant known to be on federal parole, remain at liberty. It is a judicial determination rendered in a State court, and, in a sense, it could not be "binding" on the United States or any of its officers or the Board. But it is a factor emphatically to be taken into account

before a parolee is violated and his procedural rights with respect to his revocation hearing fixed on the basis of the bare fact of the conviction on which he has been admitted to bail.

To draw these threads together: it is concluded first, that the preliminary interview accorded the parolee was not in conformity with Chairman Sigler's "New procedures" memorandum of August 9, 1972; second, that the conviction in the Binghamton Court is not, since it is not a final judgment of conviction because of the pending appeal, such a conviction as precludes a local hearing under § 2.43(b)(2); third, that appropriate deference to the judicial determination respecting bail in the Binghamton Court establishes in defendant a prima facie right to have a bail determination made in this Court; and, fourth, that the Government should be given an opportunity to present any considerations making against the allowance of bail which it may want to present including a showing, (a) if it be the case, that the bail determination in the State court did not take account of the fact that the parolee was on parole under a federal sentence, and that a warrant had been issued but not executed, or (b), if it be the case, that the parolee's

appeal is not being prosecuted diligently. It is accordingly

ORDERED that the stay of the parolee's removal to Lewisburg is continued pending determination of the question whether the parolee should be admitted to bail, and if so on what bail terms. Counsel should agree on a prompt hearing date on the bail issue.

Brooklyn, New York

February 1, 1974

John F. Dooling, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAYMOND ARGRO, : NOTICE OF MOTION

Petitioner :

74 C 143

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

----------X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD J. KELLY, duly sworn to this 26th day of February, 1974, and upon all the papers and proceedings heretofore and herein, the undersigned, in behalf of the petitioner, RAYMOND ARGRO, will move this Court, before the Honorable JOHN F. DOOLING, Jr., in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York, at a time and place to be fixed by the Court for an order (1) reaching and deciding the Habeas Corpus issues raised heretofore in petitioner's brief, or in the alternative (2) admitting the petitioner to reasonable bail pending the final determination of parole revocation proceedings; and for such other and further relief as to the Court may seem just and proper.

DATED: BROOKLYN, NEW YORK
February 26, 1974.

Yours, etc.,

ROBERT KASANOF, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 COURT STREET, ROOM 701
BROOKLYN, NEW YORK 11201

Edward J. Kelly Associate Attorney

TO: EDWARD J. BOYD, V.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

CLERK, OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[A58]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

RAYMOND ARGRO, :

Petitioner :

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

----------X

AFFIDAVIT

74 C 143

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

EDWARD J. KELLY, being duly sworn, deposes and says:

1. He is an attorney associated with ROBERT KASANOF, ESQ., Federal Defender Services Unit, The Legal Aid Society, attorney of record assigned to represent the petitioner herein, RAYMOND ARGRO.

2. This affidavit is submitted in support of a motion in behalf of the petitioner which requests an order (1) reaching and deciding the habeas corpus issues raised heretofore in petitioner's brief, or, in the alternative (2) admitting the petitioner to reasonable bail pending the final determination of parole revocation proceedings; and for such other and further relief as to the Court may seem just and proper. An earlier application for bail was heard and denied without prejudice to renewal on February 13, 1974.

3. The history of this case since February 13, 1974 is the following: After the hearing, counsel learned for the first time from petitioner that a large measure of the delay in the perfection of his state appeal was caused by the late transcription of the record by the court stenographers in Binghamton, New York. This fact was confirmed in a number of telephone calls between counsel and petitioner's counsel in the State case, A. Jack Rappaport. The latter advised that there is

but a small staff of stenographers in the Binghamton County Court and there were other transcripts the preparation of which took precedence over that of the petitioner's. Apparently, as the result of the delay, Mr. Rappaport, on or about November 30, 1973, received an additional 120 day period in which to perfect the appeal. The transcript was delivered to him in the early part of January. It is only since that time that a lack of funding of the appeal by the petitioner has resulted in further delay.

4. After discussing the situation at West Street with the petitioner on February 14, 1974 in the light of the Court's admonitions about expediting the appeal and Mr. Rappaport's position that he could not go forward with it without funds from petitioner, both the petitioner and counsel advised Mr. Rappaport by phone to withdraw from the case and forward the transcript here. This was confirmed by petitioner's and counsel's letters to Mr. Rappaport a day or so later. Also at this time, the petitioner wrote a letter to the Court concerning the background of the delay, a letter to the Appellate Division, Third Department, asking for the assignment of counsel as an indigent, and a letter to the National Lawyers Guild, with the view of their perhaps promptly intervening and taking the assignment.

5. On February 19, 1974, the situation changed. Mr. Rappaport advised by phone that petitioner's co-defendant, Russell Caine, had provided sufficient funds to cover the printing of the Appellate transcript and brief and, in view of this, Mr. Rappaport was prepared to go forward with the appeal of the petitioner since the transcript and appellate issues, particularly those involving a fair trial, were the same for both. Mr. Rappaport indicated he would protect petitioner's rights on appeal even though he might ultimately receive no fee from him.

6. On February 20, 1974, counsel discussed the options with the petitioner at West Street: to continue to seek new

counsel with its consequent delay, or to stay with Mr. Rappaport, notwithstanding past disagreements, in the hope that his familiarity with the case and its issues would result in a more prompt resolution of the appeal. After consideration, Mr. Argro advised Mr. Rappaport by phone that day that he wished him to continue as appellate counsel and to promptly forward to counsel here an affidavit setting forth the reasons for the delay in perfecting the appeal.

7. On February 25, 1974, counsel received Mr. Rappaport's affidavit, a copy of which is attached hereto.

8. In view of the present posture of the appeal and Mr. Rappaport's affidavit, which explains past delays, petitioner would submit that his appeal is now being diligently carried forward and the reason, on the basis of which the Court denied bail on February 13, 1974, has been disposed of.

9. However, the present situation of the petitioner's continued incarceration at West Street make more than ripe the determination of the habeas corpus issues and requests for relief heretofore raised in his brief. As of this writing, more than three months has elapsed since petitioner was picked up on the warrant and jailed and nearly one month has elapsed since the Court rendered its memorandum/order of February 1, 1974. Ninety-two days have elapsed, with the petitioner still confined in an overcrowded facility, deprived of his liberty, and frustrated in obtaining his protections, the Board of Parole, in the face of the statutes, its own regulations, the teachings of the cases and this Court's own admonitions, continues to deny him the appropriate and approved procedures which could resolve the question of his liberty and the future course of his life. The inaction of the Board is instinct with obtuseness, indeed, with callousness toward the situation of the petitioner, and is an index of

its attitude toward all others who are similarly situated. It has shown itself unfair, lacking in perception of human sensibilities, and arrogant in its disregard of the norms which should govern its conduct.

10. This state of affairs should no longer be tolerated by this Court. The Board has had its chance to do what is required; it has failed utterly; it has forfeited further consideration. The petitioner should be discharged.

11. WHEREFORE, it is respectfully urged that the Court reach and consider the habeas corpus issues heretofore raised in petitioner's brief; that after such consideration, the writ should issue and the petitioner be discharged; or that in the alternative, the petitioner be admitted to reasonable bail pending final determination of parole revocation proceedings; and for such other and further relief as to the Court may seem just and proper.

EDWARD J. KELLY

Sworn to before me this
21st day of February 1971

Notary Public

My Commission Expires

[A67]

STATE OF NEW YORK :
: SS
COUNTY OF BROOME :

Re: Raymond Argro, Petitioner

A. JACK RAPPAPORT, being duly sworn deposes and says:

1. That he is a duly licensed attorney at law with offices at 11 Congdon Place, Binghamton, Broome County, New York.

2. That he was attorney for the petitioner above named and one, Russell McKinley Caine, who were duly convicted by a Broome County Court and Jury for the crime of Criminal Possession of a Dangerous Drug in the Fourth Degree.

3. That subsequent, each of the defendants was sentenced to serve a term of 0 to 5 years in Attica State Prison.

4. That subsequent a Notice of Appeal was duly filed on behalf of each defendant and a Certificate of Reasonable Doubt was issued by the Hon. David F. Lee, a Supreme Court Justice, releasing the said defendant, Raymond Argro, pending an appeal.

At this time, Justice Lee was advised that the reason the Certificate of Reasonable Doubt was requested was that the Transcript would not be available until after the usual time to appeal.

5. That subsequently, and on or about November 30, 1973, a further application was made to Justice Lee for a further extension since the Transcript was not yet available and on said date, Justice Lee granted a further extension for one hundred twenty (120) days to perfect the Appeal.

6. That in January, 1973, the Court Stenographer furnished to deponent the Transcript of said proceeding and at this time questions arose as to who would be able to pay for the Transcript and the record to be printed.

LAW OFFICES
RAPPAPORT, KAHAN
& HULL
11 CONGDON PLACE
BINGHAMTON, N.Y.

7. That further, at this time, the party that posted the bail for Mr. Argro was seeking to get his money back which he had posted as bail for Mr. Argro, claiming that he needed this money to pay for his own expenses on the appeal that was pending against him.

8. Subsequently, a small sum of money was received from Mr. Argro and the Court Stenographer was paid. In the mean time the Transcript was forwarded to the Walton Reporter and as of this date the deponent has been advised that the record would be forwarded to the Appellate Division, Third Department, on Monday, February 25, 1974.

9. That in the mean time your deponent has received sufficient funds from the co-defendant to pay for the printed record and the Brief. In addition, the co-defendant has agreed with deponent to permit the cash bail which he posted on behalf of Mr. Argro to remain on file until such time as the Appeal is heard by the Appellate Division.

10. Inasmuch as the issues involved in this case are applicable to both defendants your deponent has agreed to represent both of the defendants on the Appeal, which will be ready for argument as soon as the Appellate Division advises us that the Appeal will be heard. That vital Constitutional issues are involved and deponent is of the opinion that the Appeal is meritorious.

A. JACK RAPPAPORT

Subscribed to and sworn to
before me the 22nd day of
FEBRUARY, 1974.

Notary Public

LAW OFFICES
RAPPAPORT, KAMAN
& HULL
11 CONGDON PLACE
BINGHAMTON, N Y

[A64]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

RAYMOND ARGRO,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

74 C 143

----------X

MEMORANDUM OF LAW

In support of his motion for habeas corpus relief, petitioner relies on the facts, arguments and cases cited in support of his bail application, previously filed in connection with a prior application for bail etc.

The Court is particularly referred to Barker v. Brewer, 407 U. S. 471, 488 (reasonable time for hearing) and United States ex rel. Eucce v. Benton, 287 F. 2d 534, 536 (2 Cir. 1961) (Time to object to delay; habeas corpus relief.)

Respectfully submitted,

CRIMINAL DEFENSE SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11201

[illegible]
[illegible]

[CAGJ]

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 74 C 145 Year 19 74

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD AUTRO,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

ATTORNEY'S NOTE

Attorney for

Office and Post Office Address, Telephone

26 Court Street, Room 701
Brooklyn, New York 11201

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

RAYMOND ARGRO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - - - - X

74 C 143

ORDER

It appearing that the Board of Parole has not accorded petitioner-defendant a local hearing on the charges of violation of parole, but, apparently continues to rely on the non-final conviction now on an appeal which petitioner-defendant is shown to be diligently pursuing and with respect to which the petitioner-defendant has been admitted to bail, and more than a reasonable time having elapsed within which a local hearing might have been granted to petitioner-defendant by the Board of Parole, and the United States Attorney having been given due notice of the renewed application to admit petitioner-defendant to bail made by Notice of Motion of February 26, 1974, it is

ORDERED that the petitioner-defendant be released

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from custody upon his execution of a personal appearance bond in the amount of $25,000 without deposit of cash or other security until such time as, after due hearing, the Board of Parole revokes the order of parole and terminates the parole of the petitioner-defendant, such personal appearance bond to be conditioned that petitioner-defendant appear for any local parole hearing that the Board of Parole conducts as the Board requires, that the petitioner-defendant not depart the Eastern District of New York except as directed by the Board for purpose of conducting a local parole hearing or with the permission of the Probation Officer supervising his parole, and that the petitioner-defendant abide any lawful final order of the Board of Parole, rendered after due hearing revoking the order of parole and terminating the parole of petitioner-defendant.

Brooklyn, New York

March 4, 1974.

U. S. D. J.

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